Batu Malay a/l Thandy v Saulinardi & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–2982–12 OF 2012
ZAHARAH IBRAHIM, ZAWAWI SALLEH AND UMI KALTHUM JJCA
15 OCTOBER 2014

Legal Profession — Disciplinary proceedings — Disciplinary board/committee — Appeal — Complainant not present at disciplinary committee hearing — Failure to prove complaint beyond reasonable doubt — Whether disciplinary committee rightly dismissed complaint — Whether disciplinary board ought to have agreed with disciplinary committee's findings

The appellant was an advocate and solicitor. The complainant/first respondent lodged a complaint against the appellant to the disciplinary board ('the DB') claiming that the appellant had charged 50% interest on the personal loan taken by the complainant from the appellant. The complainant also claimed that the appellant had threatened him and that the appellant's clerk had forced the complainant to put his thumbprint on a document. The complaints arose pursuant to a motor vehicle accident suit where the appellant had represented the complainant. The DB appointed the disciplinary committee ('the DC') to investigate and submit a report to the DB on the complaint. After its investigation the DC recommended that the complaint against the appellant be dismissed. The DC was unable to conclude that the appellant had a case to answer and the complaint against the appellant was not established by the complainant. The complainant was not present at the hearing to assist the DC to reach its findings. The DB disagreed with the finding and recommendation of the DC and issued a notice to appear against the appellant. The DB, upon hearing the appellant, ordered the appellant to pay a penalty of RM20,000 to the discipline fund. The appellant filed an originating motion appealing against this decision to the High Court. The High Court dismissed the appeal and hence the present appeal.

Held, allowing the appeal with no order as to costs:

(1) The first respondent's failure to attend at the disciplinary hearing before the DC to state his case and to be able to be cross-examined by the appellant was a proper ground for his complaint to be dismissed by the DC. Having done this, the DB, based on the report prepared by the DC, ought to have agreed with the findings made by the DC. The absence of the first respondent before the DC was a serious procedural flaw and as such the first respondent had failed to prove his complaint beyond reasonable doubt (see paras 14–15).

[Bahasa Malaysia summary

Perayu adalah peguambela dan peguamcara. Pengadu/responden pertama membuat aduan terhadap perayu kepada lembaga tatatertib ('LT') mendakwa bahawa perayu telah mencaj 50% faedah ke atas pinjaman peribadi yang diambil oleh pengadu daripada perayu. Pengadu juga mendakwa bahawa perayu telah mengugutnya dan bahawa kerani perayu telah memaksa pengadu untuk meletakkan cap jarinya ke atas dokumen. Aduan berbangkit berikutan tindakan kemalangan kenderaan bermotor di mana perayu telah mewakili pengadu. LT melantik jawatankuasa tatatertib ('JT') untuk menyiasat dan menyerahkan laporan kepada LT atas aduan tersebut. Selepas siasatan JT mencadangkan bahawa aduan terhadap perayu ditolak. JT tidak dapat memutuskan bahawa perayu mempunyai kes untuk menjawab dan aduan terhadap perayu tidak dibuktikan oleh pengadu. Pengadu tidak hadir semasa pendengaran untuk membantu JT mencapai dapatannya. LT tidak bersetuju dengan dapatan dan cadangan JT tersebut dan mengeluarkan notis untuk Hadir terhadap perayu. LT setelah mendengar perayu, mengarahkan perayu untuk membayar penalti sebanyak RM20,000 kepada dana tatatertib. Perayu memfailkan usul pemula merayu terhadap keputusan ini kepada Mahkamah Tinggi. Mahkamah Tinggi menolak rayuan dan maka rayuan ini.

Diputuskan, membenarkan rayuan tanpa perintah kepada kos:

(1) Kegagalan responden pertama untuk menghadiri pendengaran tatatertib di hadapan JT untuk menyatakan kesnya dan untuk membolehkan diperiksa balas oleh perayu adalah alasan betul untuk aduannya ditolak oleh JT. Setelah melakukan ini, LT, berdasarkan laporan yang disediakan oleh JT, patut bersetuju dengan dapatan yang dibuat oleh JT. Ketidakhadiran responden pertama di hadapan JT adalah kecacatan prosedur yang serius dan oleh itu responden pertama telah gagal untuk membuktikan aduannya melampaui keraguan munasabah (lihat perenggan 14–15).]

Notes

For cases on disciplinary board/committee, see 9 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1506–1510.

Cases referred to

Chan Yiew Hock v Koh Hong Toong & Anor; Majlis Peguam Malaysia (Intervener) [2011] 4 CLJ 160, HC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Hoo Lin Coln v Wong Weng Woh & Anor [2007] 1 MLJ 56, HC (refd)

Keith Sellar v Lee Kwang Tennakoon v Lee Kwang [1980] 2 MLJ 191, FC (folld)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna

Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)
Stefan v General Medical Council (1999) Times, 11 March, PC (refd)

Legislation referred to

Legal Profession Act 1976 ss 103(1), 103D, 103D(1), (3), (4)

Appeal from: Originating Motion No 25–48–03 of 2012 (High Court, Shah Alam)

D Kalai (Kalai & Partners) for the appellant.
Arthur Wang Ming Way (Nurfarhana Ab Rahim with him) (Arthur Wang Lian & Assoc) for the second respondent.

Umi Kalthum JCA:

[1] This is an appeal against the decision of the High Court dated 26 November 2012 dismissing the appellant's appeal against the decision of the disciplinary board ('the DB') dated 20 January 2012, in which the appellant was ordered to pay the penalty of Twenty Thousand Ringgit (RM20,000) payable to the discipline fund within one month from the date of the order, failing which the appellant shall be suspended pursuant to s 103(1) of the Legal Profession Act 1976 ('the Act') from practice as an advocate and solicitor until payment of the penalty ('the order').

BRIEF FACTS

[2] The brief facts of the case are as follows:

(a) the appellant is an advocate and solicitor of the High Court of Malaya and practising under the name Tetuan Batu Malay and Assoc;

(b) the complainant/the first respondent lodged a complaint against the appellant to the DB via a letter dated 29 June 2010. The contents of the letter of complaint in brief stated that the appellant had charged 50% interest on the personal loan taken by the complainant from the appellant. The appellant had also threatened the complainant and the appellant's clerk had forced the complainant to put his thumbprint on a document;

(c) on 29 September 2010 , the DB requested the appellant to give written explanation on the complaint by the complainant;

(d) the appellant in his reply, by a letter dated 1 November 2010 (p 67, *Jld* II, *Bahagian* C), stated the following:

(i) the appellant acted for the complainant in respect of a motor

vehicle accident on 18 May 2004 and a civil suit was filed at Klang Sessions Court vide action No 53–70 of 2006;

(ii) after several postponements and negotiations, the insurance company offered RM95,000 to settle the matter;

(iii) the complainant accepted this offer and consent judgment was recorded on 12 March 2010;

(iv) thereafter, the appellant's firm received the cheques from the insurance company and the complainant was called to the appellant's office;

(v) the complainant agreed to pay the appellant's fees and disbursement of RM25,000, friendly loans advanced to the complainant for the sum of RM43,280 and the sum of RM1,250 being the sales tax. The balance sum of RM25,470 was paid to the complainant. The complainant had discharged the appellant from further obligations from this case;

(vi) the appellant had settled the matter as agreed by the complainant and there was no basis for the complainant's complaint; and

(vii) in this case the complainant had benefited from the appellant's generosity in helping him to overcome his financial difficulties, incurring medical bills and monthly expenses,

(e) the DB appointed the disciplinary committee ('the DC') to investigate and submit a report to the DB on the complaint. After its investigation the DC on 4 August 2011 recommended that the complaint against the appellant be dismissed. The DC was unable to conclude that the appellant had a case to answer and the complaint against the appellant was not established by the complainant. The complainant was not present at the hearing to assist the DC to reach its findings. The DC also noted that the complainant took the loan from Malliga a/p Simanchalam and Thilagavathi a/p Simanchalam;

(f) the DB disagreed with the finding and recommendation of the DC and issued a notice to appear against the appellant to make his representation on why liability should not be found against the appellant on the complaint; and

(g) on 20 January 2012, the DB, upon hearing the appellant pursuant to ss 103D(3) and 103D(4) of the Act, ordered the appellant to pay the penalty in accordance with the order. The appellant filed the originating motion appealing against this decision to the High Court.

THE HIGH COURT DECISION

[3] The learned High Court judge found that the DB was not bound to adhere to or follow the findings and recommendations made by the DC. In this regard, the court referred to s 103D of the Legal Profession Act 1976 which provides:

> Consideration by the Disciplinary Board of the report of the Disciplinary Committee
>
> 103D(1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee.
>
> (2) The Disciplinary Board may in appropriate cases impose a greater punishment than that recommended by the Disciplinary Committee.
>
> (3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.
>
> ...

[4] The learned High Court judge also found that the failure of the DB to give reasons for its decision was not a ground to render the decision of the DB void. The learned judge found that in the absence of statutory provisions, the court was not at liberty to impose on the DB to provide reasons for its decision.

THE APPEAL

[5] Before us, learned counsel for the appellant submitted that the loan given to the first respondent was not advanced by the appellant. Reference was made to pp 109–136 of the appeal record in Part C. It can be seen from the acknowledgment receipts that the loan taken by the first respondent was from one Malliga a/p Simanchalam. It was submitted that Malliga a/p Simanchalam is the appellant's staff at his office. This fact was confirmed by the report prepared by the DC dated 4 August 2011.

[6] In the same report it was stated that the complainant was not present at the hearing before the DC and no evidence was recorded except from the record of complaint. In its conclusion, the DC found that, as the complaint against the appellant could not be established, it recommended that the complaint against the appellant be dismissed.

[7] The fact that the complainant was not present during the hearing before the DC had deprived the appellant of the opportunity to cross-examine the complainant. The appellant referred to the case of *Hoo Lin Coln v Wong Weng*

Woh & Anor [2007] 1 MLJ 56.

[8] The appellant further submitted that the DB had failed to provide reasons for its decision on 20 January 2012 in imposing the fine on the appellant. The appellant submitted that since the punishment imposed on the appellant affected his livelihood, the DB must give reasons for its decision. In support, the counsel cited the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481.

[9] The second respondent's counsel submitted that the DB was exercising the power expressly conferred upon it by statute and as such it should not be challenged. Section 103D of the Act does not impose any duty on the DB to provide grounds for its decision. In *Chan Yiew Hock v Koh Hong Toong & Anor; Majlis Peguam Malaysia (Intervener)* [2011] 4 CLJ 160 (HC) it was held that:

> As alluded earlier, the statutory framework of s 103D expressly allows the DB to disagree with the recommendations of the DC and to impose a more severe sentence as long as the appellant is notified and is given an opportunity to be heard. In any event there is no absolute duty for a decision maker to give reasons unless it is provided by the statute.

[10] Learned counsel for the second respondent cited the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65 (FC) where Edgar Joseph Jr FCJ (as he then was) cited with approval and endorsed the principles enunciated by the Privy Council in *Stefan v General Medical Council* (1999) Times, 11 March (unreported at that point in time but reported in the Times of London, 8 March 1999) at p 122, paras c–d:

> The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current development towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis (*R v Royal Borough of Kensington and Chelsea, Ex p Grillo* [1996] 28 HLR 94), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers. It was reaffirmed in *Reg v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531 , 564, that the law does not at present recognise a general duty to give reasons for administrative decisions ....

[11] The second respondent further added that there was an act of misconduct by the appellant when he had directly or indirectly been involved in the lending of money to the first respondent. The appellant was in breach of Bar Council Ruling 14.26 which states that:

> It is also conduct unbefitting of an advocate and solicitor to engage or be involved, whether directly or indirectly, in the business of money lending.

OUR DECISION

[12] From the facts of this case, we found that the first respondent had agreed to the offer made by the insurance company to settle his accident claim. The first respondent then directed the appellant to record a consent judgment and agreed to accept the RM95,000 from the insurance company. From this sum, the first respondent had agreed to deduct RM25,000 as payment for the appellant for professional fees and disbursements (see p 85, AR *Jld* II, *Bahagian* C). The first respondent had also agreed to further deduct RM43,280, being payment of friendly loan taken by the first respondent from Malliga a/p Simanchalam and Thilagavathi a/p Simanchalam (see p 89, AR *Jld* II, *Bahagian* C), and the sum of RM1,250 for sales tax (see p 90 AR *Jld* II, *Bahagian* C). Lastly, the first respondent had received the balance of RM25,470 from the appellant (see p 88, AR *Jld* II, *Bahagian* C) and the first respondent had acknowledged that he has no further claims against the appellant after receiving this payment from the appellant's firm (see p 86, AR *Jld* II, *Bahagian* C). These facts could be seen vide letters referred to and signed by the first respondent dated 11 May 2010.

[13] Despite all these letters of acknowledgement by the first respondent, the first respondent had lodged a complaint against the appellant on 29 June 2010 stating that the appellant had charged 50% interest on the personal loan taken from the appellant, the appellant threatened the first respondent and the appellant's clerk had forced the first respondent to put his thumbprint on a document. The first respondent had also lodged a police report on 29 June 2010 reporting the same complaint against the appellant. And yet the first respondent had failed to attend the hearings before the DC on 28 April 2011, 20 May 2011, 24 June 2011 and 4 March 2011. No reasons were provided by the first respondent to explain his absence before the DC.

[14] We found that the first respondent's failure to attend/be present at the disciplinary hearing before the DC to state his case and to be able to be cross-examined by the appellant was a proper ground for his complaint to be dismissed by the DC. Having done this, the DB, based on the report prepared by the DC, ought to have agreed with the findings made by the DC.

[15] We agreed with the submission by learned counsel for the appellant that the absence of the first respondent before the DC was a serious procedural flaw and as such the first respondent had failed to prove his complaint beyond reasonable doubt.

[16] In *Keith Sellar v Lee Kwang Tennakoon v Lee Kwang* [1980] 2 MLJ 191 (FC), at p 194, Hashim Yeop Sani J (as he then was), delivering the judgement of the Federal Court, stated:

The second question is what burden of proof did the disciplinary committee apply in arriving at its findings. Looking at the grounds given in its statement of findings, the disciplinary committee although it made very firm findings unfortunately did not say expressly what standard of proof it adopted in arriving at its decision.

First, what is the standard of proof required in such a proceeding? Very recently this court in *Au Kong Weng v The Bar Committee, State of Pahang* dealt with the same question and accepted the standard set by *Bhandari*'s case . Lord Tucker in that case approved the required standard established by the Court of Appeal in that in every allegation of professional misconduct involving the element of deceit or moral turpitude a high standard of proof is called for. The Court of Appeal also expressed the view that any body of professional men sitting in judgment on a colleague should not be content to condemn on a mere balance of probabilities.

The standard of proof required in a proceeding of this type is proof beyond reasonable doubt. In the judgement of this court in *Au Kong Weng*'s case , the Chief Justice said:

It is a question for the committee to decide, first, whether the facts alleged in the charge had been proved beyond reasonable doubt and secondly whether the appellant in relation to those facts, was guilty of such conduct ...

[17] We were of the view that the learned High Court judge had failed to properly appreciate the facts as alluded to by us and as tendered by the appellant. If he had done so he would have found, as we did, that the first respondent had failed to prove his complaint beyond a reasonable doubt. On the issue of burden of proof, we disagreed with the second respondent's submission that the standard of proof has not been provided for statutorily. This court is bound by the decision of the Federal Court in *Keith Sellar* and we subscribed to it.

[18] We agreed with the decision of the learned High Court judge that the DB was not bound to follow the findings and recommendations made by the DC by virtue of s 130D(3) of the Act and there was no general duty to give reasons for its decision as there was no statutory obligation to do so. Whilst we say this, we noted that s 103D(1) had been subsequently amended vide the Legal Profession (Amendment) Act 2012 (Act A1444) and brought into force on 3 June 2014 vide PU(B) 262 of 2014 wherein the words 'and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall record the reason for the rejection' were inserted after the words 'recommendation of the Disciplinary Committee'. So this issue is now put to rest.

[19] We, however, allowed this appeal for the reasons stated above. We allowed the appellant's originating summons in prayers (a) and (b) and set aside the decision of the High Court. We made no order as to costs. Deposit was refunded.

Appeal allowed with no order as to costs.

Reported by Kanesh Sundrum